In the Supreme Court of the United States

OCTOBER TERM

No. 79-698

RICHARD W. BOTHMAN, as Chief Probation Officer,
Santa Clara County Superior Court,
Juvenile Division;
ex rel, PHILLIP B, a Minor,
Petitioner,

vs.

WARREN B. and PATRICIA B.,
Respondents.

Petitioner's Reply to Respondents' Response to Petition for Writ of Certiorari

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Petitioner served a copy of his petition for writ of certiorari on October 17, 1979. This Court requested opposition to that petition which was served by respondent on February 22, 1980. This reply to that response is submitted pursuant to Supreme Court Rule 24(4).

STATEMENT OF FACTS

A. Phillip's Life Expectancy

In their Statement of Facts respondents summarize Dr. Gathman's testimony as not knowing how long Phillip would live if the operation were not performed nor the

extent his life span will be increased if the operation is performed (Opposition 5). Dr. Gathman testified that since cardiac surgery has only been done for the past 25 years, there are no statistics on actual life expectancy; however, it is the consensus of the medical community that the life expectancy of those operated on is "significantly lengthened and approaches normal" (RT 29). Dr. Gathman explained that the statistics on the life expectancy of children suffering from Down's Syndrome are also incomplete because, prior to 1945 and the advent of antibiotics:

> "they had shortened life expectancy because they had died of infection. Now, that we've solved the infection problem, they are living longer. But, there are no very good statistics in terms of what their life expectancy is in 1977. It appears that if a Down's Syndrome child lives to five years of age, he is only six percent less likely than a normal child to live to forty years of age." (RT 28). "Once they get to Phillip's age, beyond ten, their life expectancy without heart disease may approach normal." (RT 27).

B. Parents' Reasons Not to Consent

In their response to the petition for certiorari, the parents list the chief concerns supporting their decision not to consent to the operation as:

> "1) the risks inherent in the operation; 2) the lack of medical expert unanimity on the necessity of the operation; 3) the danger that if Phillip's life expectancy is artificially extended, he would likely outlive them and therefore be without the guaranteed financial support or the supervision of his environment that only they can provide" (Opposition p. 7).

Asked when he had first encountered medical opinion that the surgery was too risky, Phillip's father testified that he

was relying on the doctor's testimony at the hearing (RT 109-110). There is no evidence in this record of a lack of medical expert unanimity on the *necessity* of this operation to prolong Phillip's life. The medical testimony at the hearing was unanimous that the operation should be performed if Phillip were an otherwise normal child.[1] Phillip's parents testified they had decided against this operation in 1973, before even the scope of the heart defect had been determined by cardiac catheterization (RT 92-93).

In addition to their fears for Phillip's future should he out-live them, his parents expressed additional reasons to support their decision against the operation. His father expressed the fear that if Phillip ever left a sheltered environment he would be victimized by others in our society (RT 97); "we went through the quality of life consideration. Life, in and of itself is not what it's all about." (RT 95); "there is no useful point in extending his life beyond the natural, by means of this operation." (RT 113); that it would be best for Phillip and the rest of the family if he were dead (RT 111). Phillip's mother expressed her reasons as: "his life is not going to change. He's basically doing what he'll be doing most of his life. He may become a little more active, but he's always going to be under shelter conditions. So, we are just extending the sameness of it all. . . . Retarded people don't have a sense of time, like you and I do." (RT 126).

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1. Dr. Gathman recommended the operation for Phillip (RT 21). Dr. French made no recommendation concerning Phillip, but testified that if Phillip was not afflicted with Down's Syndrome he would recommend the operation (RT 43; 39). Dr. Hartzel's recommendation against the operation was based solely on the fact that Phillip is mentally retarded.

REASONS FOR GRANTING THE WRIT

I. The Erroneous Application of Too High a Standard of Proof Denied Phillip the Equal Protection of the Law.

In response to this reason for granting the writ, Phillip's parents contend that the decision of the Court of Appeal of the State of California is "consistent with current state law." They cite three cases in which the California courts applied the "clear and convincing" standard[2] and three cases in which the California courts have applied the "preponderance of evidence" test.[3] Respondents conclude that the court order petitioner sought in the instant case is:

> "far closer in its severity to the types of disposition for which precedent establishes the 'clear and convincing' evidence test than to the mild disposition in such cases as *Christopher B., supra,* and *Lisa D., supra,* in which proof by preponderance was held sufficient." (Opposition, p. 11).

In re Robert T., supra, the Juvenile Court had removed the child from his parents' custody, *In re Terry D., supra,* the court had declared the parents' six children permanently free from parental control and custody, and, *In re B. G., supra,* involved a court order awarding custody of two minor children to their foster parents against the claim of their mother. The contemplated disposition in this case was an order of juvenile court allowing the operation to be performed. There was no request that Phillip be removed from the custody of his parents or that custody be awarded to a third party.

2. *In re Robert T.,* 61 Cal.App.3d 310, 132 Cal.Rptr. 5 (1976); *In re Terry D.,* 83 Cal.App.3d 890, 148 Cal.Rptr. 221 (1978) and *In re B. G.,* 11 Cal.3d 679, 114 Cal. Rptr. 444 (1974).

3. *In re Lisa D.,* 81 Cal.App.3d 192, 146 Cal.Rptr. 178 (1978); *In re Christopher B.,* 82 Cal.App.3d 608, 147 Cal.Rptr. 390 (1978); *In re Nichole B.,* 93 Cal.App.3d 974, 115 Cal.Rptr. 916 (1979).

We concur in respondent's observation that this case is not directly in point with any of the other cases referred to (Opposition, p. 11). Petitioner submits that the requested disposition here is akin to *In re Lisa D., supra,* where the juvenile court declared the children dependent wards of that court "their legal care, custody and control are removed from both of their natural parents . . . they're returned home on probation in the home of the father." [*In re Lisa D., supra,* 81 Cal.App.3d at 196, fn.3, 146 Cal.Rptr. at 181]; or *In re Christopher B., supra,* where the court declared the children dependent wards of the court but left them in their parents' custody while the court retained jurisdiction to supervise the proper maintenance of their environment [*In re Christopher B., supra,* 82 Cal.App.3d at 610, 612, 617; 147 Cal.Rptr. at 391, 392, 395]; and, *In re Nichole B., supra,* where the court declared the child a dependent ward of the court but left her in her mother's custody, under supervision of the County Welfare Department, upon the condition that the mother have no contact with the man who had assaulted the child [*In re Nichole B., supra,* 93 Cal.App.3d at 876, 882; 155 Cal.Rptr. at 920]. In each of these cases the court interfered to some extent with the parents' absolute custody and control over their minor child, but did not remove the child from the parents' control. "Consistent with current state law" the courts applied the preponderance standard.

Petitioner finds gruesome respondents' attempt to equate the extinguishment of the parent/child relationship by court decree with his effort to lengthen that relationship.[4]

4. Petitioner notes a strange dichotomy in respondents' argument. They refer to the operation as "non-life or death" but, on the same page, recognize that the order sought is "literally a 'once in a lifetime' matter." (Opposition, p. 11).

Respondents contend that the correct standard of proof would be "proof beyond a reasonable doubt." (Opposition, p. 11-12). It would be macabre to require the state to prove Phillip's needs outweigh his parents' wishes beyond a reasonable doubt. Fortunately, this Court has dismissed the applicability of that standard in proceedings of this type. *Compare, Addington v. Texas* (1979) 441 U.S. 418, 427-431.

II. The Admission of "Quality of Life" Evidence in the Juvenile Court Proceedings Denied Phillip Due Process of Law.

Respondents contend that our objection to the introduction of "quality of life" evidence is presented for the first time in this Court. In our opening brief on appeal in the California Court of Appeal we stated:

> "Phillip's parents explain that their refusal to consent to corrective surgery is based, at least in part, on the belief that it would not be in Phillip's best interests to prolong his life when there was no hope of improving its quality. The juvenile court, seemingly impressed by the depth and sincerity of the Becker's beliefs, opined that it would be inappropriate for a court to second guess them (RT 149). Appellants respectfully submit such considerations are outside the scope of those which can be adjudicated by the juvenile court.
>
> "Dr. French has only seen Phillip for the purposes of determining whether the operation to correct his heart defect can be done within reasonable risks (RT 44). Before recommending such surgery for a Down's child Dr. French conducts frequent meetings with the child's parents and others important to the child in

order to develop a background for the decision (RT 45-46). However, Dr. Gathman and Dr. French can only recommend surgery, the ultimate decision whether or not to perform it, rests with the surgeon (RT 46). Thus viewed, the issue before the juvenile court was whether to authorize this operation, if the doctors recommend it, or to deny Phillip the opportunity to be medically evaluated at the threshold by his parents' refusal to give their consent. To base that decision on the 'quality' of Phillip's life, or his degree of mental retardation, creates a suspect classification under the 14th Amendment. Compare *San Antonio Independent School District v. Rodriguez* (1973) 411 U.S. 1. *Burgdorf*: 'A History of Unequal Treatment: The Qualifications of Handicapped Persons as a 'Suspect Class' under the Equal Protection Clause' 15 Santa Clara Lawyer 855.

> 'The right to life, liberty and the pursuit of happiness is not reserved to the healthy, able-bodied children and adults. It applies with even more force and intensity to the helpless, the physically handicapped, the mentally defective and the most unfortunate of children such as those at Willowbrook.' *In re D.* (1972) 70 Misc.2d 953; 355 N.Y.S. 2d 638, 651.

> Since this surgery is ordinarily done for normal children the juvenile court should not have considered the mental quality of Phillip's life in deciding whether consent for this surgery should be given if the doctors recommend it. See *Horan;* Euthanasia—Medical Treatment and the Mongoloid Child; Death as a Treatment of Choice? 27 Baylor Law Review 76." (Appellant's Opening Brief, pp. 13-14).

Perhaps respondents misconstrued the scope of our contention. Petitioner not only objects to the report of Dr. Hartzell, which was admitted into evidence (RT 86) and consid-

ered by the trial court in reaching its decision (RT 148), but also to the trial court's adoption of the parents' reasoning. Since his parents had made up their minds years before and based their objections primarily on quality of life considerations, Phillip was denied his due process right to a neutral and detached factfinder.[5] In deciding this case the trial court remarked,

> "The parents made the decision or maybe they didn't make the first decision. The doctors, I guess made the first decision. The parents disagree with it. Somebody else looked over their shoulder and this case resulted. And I'm being asked to make the decision. So, *I'm in effect sitting as an appellate court,* so to speak, over a series of decisions that had been made before they got here. *I'm reviewing other people's decisions,* one of the decision makers, being the natural parents. (RT 149)."
>
> * * *
>
> "And, it seems to me that if parents are doing everything that they can, and therefore, are in fact acting in the child's best interest, then, *it is not for me* or anybody else *to decide* that they can't do it.
>
> "I think there is no way to sustain the petition unless we decide that they don't have that right, someone else has the right to second-guess them. And what bothers me about it is that we have two days of testimony and witnesses all intelligent and educated people, and I'm impressed by the fact that nobody, including the judge in this case appeared to me to be any smarter than Mr. and Mrs. Becker. Who are they or *who am I to decide to say that they can't make the right decision*" (RT 153). (Emphases added.)

5. "We conclude that the risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiries should be made by a 'neutral factfinder' to determine whether the statutory requirements for admission is satisfied." *Parham v. J.R.*, ... U.S. ....., 99 S.Ct. 2493, 2506 (1979).

By adopting the position that its role was that of appellate review of the parents' decision, the trier of fact effectively denied Phillip his right to a neutral and detached factfinder. This is particularly troublesome in this case since respondents' concerns supporting their decision against the operation (Opposition, p. 7) were all formulated after Dr. Gathman recommended the operation in 1977. Yet, the record shows that respondents had a preconceived opinion. They had refused a similar recommendation in 1973 and it "was never mentioned that we would be asked to reconsider our earlier decision as to whether or not the heart condition should be operated on" (RT 93).

CONCLUSION

Wherefore, on behalf of Phillip B., petitioner respectfully requests this Court issue a writ of certiorari to review the decision of California Court of Appeal, First Appellate District, Division Four in *"In re Phillip B."*, number 1/Civil No. 44291 in the files of that Court.

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